TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 357

UNITED STATES, PETITIONER

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1960
CERTIORARI GRANTED NOVEMBER 14, 1960

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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* * * *

[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

I.

SUMMARY STATEMENT OF PROCEEDINGS IN COURT BELOW

This appeal is taken from the denial of plaintiff's motion for summary judgment, the granting of defendant's cross-motion for summary judgment dismissing the complaint, and the judgment entered thereon.

The complaint, seeking refund of an overpayment of $5,769,159.92 income taxes for 1951, was filed on June 6, 1956.

The answer, interposing a general denial and affirmative defense of collateral estoppel was filed November 30, 1956.

The defendant's motion for summary judgment on its affirmative defense of collateral estoppel was denied on June 5, 1958.

On June 23, 1959, the parties, through their respective attorneys, entered into a stipulation eliminating all factual issues and narrowing the legal issue to be presented for determination.

On June 23, 1959, the plaintiff moved for summary judgment, based upon the pleadings and stipulation. On August 17, 1959, based upon the same papers, the defendant made a cross-motion for summary judgment dismissing the complaint.

On October 23, 1959, the decision of Judge Sugarman, denying plaintiff's motion and granting defendant's motion, was filed and the judgment thereon was entered.

On December 2, 1959, the plaintiff filed its notice of the appeal above mentioned.

[fols. 2-3] • • •

[fol. 4] IN UNITED STATES
DISTRICT COURT

III.

PROCEEDINGS FROM WHICH APPEAL IS TAKEN

DECISION, ORDER AND JUDGMENT—October 23, 1959

The facts presented by this litigation are set forth in Judge Palmieri's decision in *Consolidated Edison Company of New York* v. *United States*, 162 F. Supp. 854 (S. D. N. Y. 1958).

The identical issues presented by this litigation, except that they dealt with earlier years, are set forth in Judge Littleton's decision in *Consolidated Edison Company of New York* v. *United States*, 135 F. Supp. 881 (Ct. Cl. 1955), *cert. denied* 351 U. S. 909. No gainful purpose can be served by repeating the facts or issues.

Assuming that *Standard Oil Company* v. *United States* 51 AFTR 1688, 56-2 U. S. T. C. Para. 10051 (N. D. Ohio 1956), is not distinguishable on its facts from *Consolidated Edison Company of New York* v. *United States*, *supra*, I am disposed to follow what was said in the latter case. Accordingly, the plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment, dismissing the complaint, is granted.

It is so ordered. No further order is necessary.

SIDNEY SUGARMAN
United States District Judge

Judgment entered October 23, 1959.

HERBERT A. CHARLSON, Clerk

[fol. 5] IN UNITED STATES
DISTRICT COURT

STIPULATION ON FACTS AND LEGAL ISSUE—June 23, 1959

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties:

1. The pleadings are hereby amended to eliminate the issues raised herein with respect to

(a) New York City real estate taxes for the City's fiscal year ending June 30, 1946, and all fiscal years prior thereto, and

(b) depreciation.

2. The pleadings are hereby amended to eliminate all issues of fact other than the determination of the amounts involved herein, which determination is to be made as hereinafter more specifically provided.

3. The pleadings are hereby amended to raise the sole issue of law, namely:

> whether, under Section 23(c) of the Internal Revenue Code of 1939, a contested real estate tax liability accrues in the year the litigation is settled or, prior thereto, in the year the disputed tax is involuntarily paid.

Dependent upon this issue is a collateral issue,

> whether the right to a partial refund of the contested and involuntarily paid tax, as determined by the settlement, constitutes accrued income in the year of settlement.

[fol. 6] These issues of law are identical with the legal issues presented to, and decided by, the United States Court of Claims in *Consolidated Edison Company of New York, Inc.* v. *United States* (1955), 133 Ct. Cls. 376; 135 F. Supp. 881 (hereinafter referred to as the "prior suit").

On these issues of law plaintiff maintains that

(a) $8,614,720.22 was erroneously disallowed as a deduction in 1951, and

(b) $2,487,935 was erroneously included in its gross income for 1951.

The method by which these figures are arrived at is set forth in paragraphs 7 and 8, infra.

Nothing contained herein, however, shall be construed as a limitation or qualification of the Government's right to raise the question of *res judicata* or collateral estoppel on any appeal taken herein.

4. During the calendar years 1946 to 1950, inclusive, the plaintiff owned hundreds of parcels of real estate in the City of New York which were subject to New York City real estate of corporations tax (hereinafter referred to as real estate tax).

5. The City of New York operated on a fiscal year basis, commencing July 1 and ending the following June 30.

6. For each of the New York City fiscal years 1946/1947 to 1950/1951, inclusive, and pursuant to the laws of the State of New York and the City of New York

(a) the New York City Tax Commission fixed, for real estate tax purposes, on each and every parcel of [fol. 7] real estate owned by plaintiff, a tentative assessed valuation thereon as of the taxable status date, January 25, preceding the fiscal year involved;

(b) plaintiff filed bona fide protests with said Tax Commission on or before the following March 15, claiming overvaluations with respect to some of said parcels and stating the amounts that were claimed to be the correct valuations thereon as of the taxable status date;

(c) the Tax Commission, on or before the following May 25, fixed final assessed valuations on said contested parcels, which final assessed valuations were placed upon the final assessment rolls;

(d) the New York City Council, on or before the following June 25, established the real estate tax rates for the ensuing fiscal year;

(e) real estate tax bills, the product of the final assessed valuations and the established tax rates for

the fiscal years involved, were sent to plaintiff for the real estate parcels owned by plaintiff, which bills were payable in two equal installments, on October 1 and April 1 of said fiscal year. The amounts of taxes thus billed bore penalty interest at the rate of 7% per annum if not paid within one month of the due dates and became liens on the properties involved as of said due dates, which liens could not be suspended (148) or removed, except by payment of the amounts billed, and which liens, in the event of non payment of the amounts billed, could be foreclosed like a judgment lien, regardless of the fact that the tax was being contested;

[fol. 8] (f) the plaintiff, on or before October 25, duly instituted in the Supreme Court of the State of New York bona fide legal proceedings, commonly referred to as certiorari proceedings, contesting the correctness of the final assessed valuations placed upon some of its real estate parcels and seeking a judicial review thereof; these certiorari proceedings were the exclusive statutory method by which plaintiff could obtain a judicial review of the protested and contested assessed valuations; in the petitions filed therein, plaintiff stated the amounts it claimed to be the correct valuations, as of the taxable status dates, of the properties involved; such statements constituted, under New York law, admissions of liability for real estate taxes on the parcels in dispute in amounts computed on the basis of the claimed valuations; and the Court, in the certiorari proceedings had no power to reduce the contested assessed valuations below the valuations stated in the petitions;

(g) pending the outcome of said judicial proceedings and for the purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all of its rights, plaintiff paid under protest the contested real estate taxes, as billed;

(h) the certiorari proceedings thus instituted were settled in 1951 by which it was determined that

some parts of the contested real estate taxes were properly assessed and collected and some parts thereof were improperly assessed and collected; and refunds of the real estate taxes thus determined to have been improperly assessed and collected were made by the City of New York.

[fol. 9] 7. With respect to the parcels involved in the proceedings referred to in paragraph 6(f), the totals, as taken from the books and records of the plaintiff, of

—the disputed valuations thereon, as per original assessment.

—the claimed correct valuations and over-valuations thereon as stated in plaintiff's protests filed with the New York City Tax Commission and as alleged in plaintiff's petitions for review filed in the State Courts,

—the assessed valuations thereon as finalized by the City Tax Commission,

—the contested real estate taxes thereon that were paid,

—the parts of said contested real estate taxes which the City refunded to the plaintiff pursuant to the settlement; and

—the parts of said contested real estate taxes which were by said settlement finally determined to have been properly assessed

are set forth in the schedule appearing in this paragraph. The figures appearing therein are subject to the right of the defendant to make such check and verification as it may deem necessary and as is hereinafter set forth, which right is expressly reserved to the defendant.

Disputed Tentative Assessed Valuations (1)	Over-Valuations Claimed in Protests (2)	Correct Valuations Claimed in Protests (1 minus 2) (3)	Final Assessed Valuations on the Properties in Dispute (4)	Over-Valuations Claimed in the Certiorari Proceedings (5)	Correct Valuations Claimed in the Certiorari Proceedings (4 minus 5) (6)	Amounts of Real Estate Taxes Paid That Were Contested (7)	Amounts of Said Contested Real Estate Taxes Refunded to Plaintiff (8)	Amounts of Said Contested Real Estate Taxes as Finally Determined to Have Been Proper (7 minus 8) (9)
$ 63,073,600	$ 10,268,400	$ 52,805,200	$ 63,073,600	$ 10,268,400	$ 52,805,200	$ 292,250.27	$ 66,145.00 (a)	$ 79,980.13 (b)
410,765,900	97,356,150	313,409,750	410,527,400	97,284,250	313,243,150	2,925,546.94	1,020,232.50	1,905,314.44
122,844,100	108,615,750	314,228,350	422,844,100	108,615,750	314,228,350	3,239,580.43	764,162.50	2,475,417.93
436,573,000	105,907,420	330,665,580	436,573,000	105,907,420	330,665,580	3,156,256.61	465,522.50	2,690,734.11
413,409,200	101,096,420	312,312,780	413,371,200	101,058,420	312,312,780	3,270,292.22	171,872.50 (c)	1,463,273.61 (d)

(a) This figure represents one-half of $122,290.00 the total fiscal year disputed Real Estate Taxes refunded to Plaintiff, because only the second half of said Real Estate Taxes is involved in the present suit.

(b) This figure represents one-half of $159,960.27 the total fiscal year disputed Real Estate Taxes finally determined to have been proper, because only the second half of said Real Estate Taxes is involved in the present suit.

(c) This figure represents one-half of $343,745.00, the total fiscal year disputed Real Estate Taxes refunded to Plaintiff, because only the first half of said Real Estate Taxes is involved in the present suit.

(d) This figure represents one-half of $2,926,547.22, the total fiscal year disputed Real Estate Taxes finally determined to have been proper, because only the first half of said Real Estate Taxes is involved in the present suit.

[fol. 11] 8. The figures appearing in columns 8 and 9 of the schedule in paragraph 7, supra, showing the amounts of the contested real estate taxes which were refunded to plaintiff, and the amounts thereof which were determined to have been properly assessed and collected, are on the basis of the New York City fiscal year; and are allocable on a calendar year basis, as follows:

	Applicable to New York City Fiscal Year	Applicable to Calendar Years				
		1947	1948	1949	1950	Total
	(1)	(2)	(3)	(4)	(5)	(6)
Amount of Disputed Real Estate Taxes Refunded to Plaintiff						
July 1-1946 to June 30-1947	$ 132,290.00	$ 66,145.00 (A)	$	$	$	$ 66,145.00
July 1-1947 to June 30-1948	1,020,232.50	510,116.25	510,116.25			1,020,232.50
July 1-1948 to June 30-1949	764,162.50		382,081.25	382,081.25		764,162.50
July 1-1949 to June 30-1950	465,522.50			232,761.25	232,761.25	465,522.50
July 1-1950 to June 30-1951	343,745.00				171,872.50 (B)	171,872.50
Total—		$ 576,261.25	$ 892,197.50	$ 614,842.50	$ 404,633.75	$2,487,935.00
Finally Determined to Have Been Proper						
July 1-1946 to June 30-1947	$ 159,960.27	$ 79,980.13 (A)	$	$	$	$ 79,980.13
July 1-1947 to June 30-1948	1,905,314.44	952,657.22	952,657.22			1,905,314.44
July 1-1948 to June 30-1949	2,475,417.93		1,237,708.97	1,237,708.96		2,475,417.93
July 1-1949 to June 30-1950	2,690,734.11			1,345,367.06	1,345,367.05	2,690,734.11
July 1-1950 to June 30-1951	2,926,547.22				1,463,273.61 (B)	1,463,273.61
Total—		$1,032,637.35	$2,190,366.19	$2,583,076.02	$2,808,640.66	$8,614,720.22

(A) Only Second Half Involved in Federal Income Tax Refund Suit

(B) Only First Half Involved in Federal Income Tax Refund Suit

[fol. 12] 9. The $2,487,935, representing the total amount of disputed real estate taxes refunded to plaintiff, and the $8,614,720.22, representing the total amount of disputed real estate taxes finally determined to have been properly assessed and collected as set forth in column 6 of the schedule in paragraph 8, supra, represent the same disputed and contested real estate taxes referred to respectively in paragraphs 3(a) and 3(b), supra.

10. To facilitate the presentation and consideration of the facts and legal issue involved herein, it is stipulated that the illustrative example, set forth below, illustrates the factual background in which the issue of law presented herein arises. A similar illustration was stipulated by the parties and adopted by the Court of Claims in the prior suit (see Finding No. 42, 133 Ct. Cls. 376, 399).

The example, which is applicable to all of the years involved herein, is as follows:

(a) for the year 1949 plaintiff was notified, on January 25, 1949, of a tentative assessment in the amount of	$100.
(b) plaintiff duly filed by March 15, 1949, a bona fide protest, admitting liability of	85.
and petitioning for an administrative reduction of said tentative assessment by	15.
(c) after hearing duly held and on or about May 25, 1949, final assessment was made in the amount of	100.
[fol. 13] (d) thereafter on or about October 1, 1949, under protest and for the stated purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all rights, payment was made of	$100.
(e) on October 25, 1949, certiorari proceedings were duly instituted in the New York Supreme Court admitting liability of, and denying liability in excess of	85.
(f) in December, 1951, the certiorari proceedings were settled, fixing the tax liability at	95.
and establishing an overpayment which was duly refunded, in the amount of	5.

11. The legal issue raised herein, in terms of the illustrative example, is as follows:

(a) whether plaintiff is entitled to a deduction in 1951 of $10, which represents that portion of the disputed $15 which was determined in 1951 to have been properly assessed, and

(b) whether there was erroneously included in plaintiff's 1951 taxable income $5, which represents that portion of the disputed $15 which was determined in 1951 to have been improperly assessed and which was refunded to plaintiff.

12. In the event a motion for summary judgment is made herein on the basis of this stipulation and the plaintiff finally prevails upon the question of law thus presented, the Government shall have ninety days after the decision of the Court has become final within which to check the correctness of the figures shown in the schedules in paragraphs 7 and 8, supra, and to notify [fol. 14] plaintiff of any error it may have discovered. If no such notice of error is given, the plaintiff shall be entitled to have judgment entered accordingly. If the Government gives such notice of error, said notice shall specify the particular errors it claims to have discovered and the parties shall have thirty days after such notice within which to agree upon the correction of the designated errors; and if agreement thereon is not had within said thirty days, either party shall have the right to apply to the Court for the appointment of a referee to hear and determine the correct amounts of said figures in dispute, or for such other method of resolving the dispute as the Court may deem proper; and upon the Court's approval of the referee's report, or such other method of resolving the dispute, judgment may be entered herein based upon the figures used herein as modified or corrected by said referee's report or other method determined by the Court.

13. The pendency of any such investigation, verification, or recomputation shall not be construed by either party to prevent the other party from taking such steps as it may deem necessary to secure appellate review of

any interlocutory decision of this Court under 28 U. S. C. 1292(b) or otherwise.

Dated: New York, N. Y.

June 23, 1959

(Signed by attorneys for the respective parties.)

[fols. 15-59] • • •

[fol. 60] IN UNITED STATES DISTRICT COURT

V

THE PLEADINGS

COMPLAINT

The plaintiff, Consolidated Edison Company of New York, Inc., by its attorneys, Whitman, Ransom & Coulson, complaining of the defendant herein, respectfully alleges upon information and belief:

1. Plaintiff is and at all times hereinafter mentioned was a public utility corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at 4 Irving Place, in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York; and is engaged in the manufacture, distribution and sale of electrical energy, gas and steam.

2. This action is brought under Title 28, U. S. C. §1346(a).

3. Plaintiff has at all times hereinafter mentioned filed its Federal income tax returns on an accrual and on a calendar year basis with the Collector of Internal Revenue and with the District Director of Internal Revenue for the district in which plaintiff maintained its principal place of business.

4. On June 13, 1952, pursuant to an extension duly granted, plaintiff duly filed its completed Federal income tax return for the calendar year 1951 disclosing an income tax liability of $30,310,237.76, which amount was assessed [fol. 61] and duly paid to the then Collector of Internal Revenue for the Second District of New York and the then District Director of Internal Revenue of New York, Lower Manhattan, in installments as follows:

March 17, 1952	$10,868,000.00
June 13, 1952	10,349,166.43
September 15, 1952	4,546,535.67
December 15, 1952	4,546,535.66
Total	$30,310,237.76

5. Thereafter, the Commissioner of Internal Revenue, after audit of plaintiff's income tax return for the calendar year 1951, assessed a deficiency of income tax for that year against plaintiff in the principal amount of $191,657.88, which amount together with deficiency interest thereon of $35,519.72, making a total of $227,177.60, was duly paid by plaintiff to the then Acting District Director of Internal Revenue of New York, Lower Manhattan, on July 5, 1955.

6. On February 10, 1955 plaintiff duly filed with the then District Director of Internal Revenue of New York, Lower Manhattan, a claim for refund on account of its overpayment of Federal income taxes for the calendar year 1951 in the amount of $5,769,159.92. A copy of said claim for refund is hereto annexed, marked Exhibit A and made a part hereof as if herein set forth at length.

7. On March 15, 1955 plaintiff duly filed with the then District Director of Internal Revenue of New York, Lower Manhattan, (3) a claim for refund on account of its overpayment of Federal income taxes for the calendar [fol. 62] year 1951 in the amount of $30,310,237.76. A copy of said claim for refund is hereto annexed, marked Exhibit B and made a part hereof as if herein set forth at length.

8. This suit is predicated upon the same bases as those stated in said refund claims, namely (1) the improper increase of plaintiff's net income for 1951 by $2,597,364.00, which amount represents the aggregate of refunds received by plaintiff in that year from the City of New York on account of overpayments of real estate taxes made to the City of New York for the years 1943 to 1950 inclusive; (2) the failure to deduct $8,770,438.80, as real estate taxes accrued and which were allowable as a deduction in 1951, which amount represents the accrual of the aggregate of those portions of the disputed and contested New York City real estate taxes of the plaintiff for the years 1943 to 1950 inclusive, which were determined in 1951 by order of the Supreme Court of the State of New York to be due the City of New York; and (3) the failure to deduct for depreciation on account of Special Obsolescence $1,005,771.40 covering the retirement in place of four motor driven reciprocating gas

compressor, motors and related equipment at the Hunts Point Gas Manufacturing Plant of plaintiff and which were allowable as a deduction in 1951.

9. The then District Director of Internal Revenue of New York, Lower Manhattan, gave plaintiff statutory notice of rejection of the above mentioned claims for refund in the amounts of $5,769,159.92 and $30,310,237.76 by registered letters dated March 28, 1955 and May 9, 1955, respectively.

[fol. 63] 10. By reason of all of the foregoing, plaintiff is legally and justly entitled to receive from defendant the sum of $30,310,237.76, or so much thereof as may ultimately be determined to have been erroneously, illegally and wrongfully exacted, collected and withheld from plaintiff, together with interest thereon as provided by law.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $30,310,237.76, or so much thereof as may be legally refundable, together with interest thereon as provided by law, and the costs and disbursements of this action.

WHITMAN, RANSOM & COULSON

By JAMES K. POLK
A partner of said firm
Attorneys for Plaintiff
No. 40 Wall Street
New York 5, New York

EXHIBIT A

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

Name of taxpayer or purchaser of stamps CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Street address 4 Irving Place
City, postal zone number, and State New York 3, New York

[fol. 64] 1. District in which return (if any) was filed New York Lower Manhattan, (2nd District)
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1951, to Dec. 31, 1951
3. Kind of tax Income Tax
4. Amount of assessment, $30,310,237.76 dates of payment See "Rider" Attached
6. Amount to be refunded $5,769,159.92

The claimant believes that this claim should be allowed for the following reasons:

For basis of claim, see "Rider" annexed hereto and incorporated herein and made a part hereof.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

C. E. EBLE
Vice President

Dated February 10, 1955

[fol. 65] RIDER

The taxpayer is a public utility corporation organized and existing under and by virtue of the laws of the State of New York and is engaged in the manufacture, distribution and sale of electrical energy and gas. It keeps its books of account and files its Federal income tax returns on a calendar year and accrual basis.

During the period of 1943 to 1951 inclusive, taxpayer and its subsidiaries (excluding its wholly owned subsidiary New York Steam Corporation) owned real estate within the City of New York which together with the improvements erected thereon were valued by the City of New York for the purposes of real estate of corporations taxes in varying amounts at an aggregate low of

$472,192,350 for the fiscal year 1946/1947 and an aggregate high of $549,200,750 for the fiscal year 1950/1951.*

During this period, the City of New York was on a fiscal year basis, from July 1 to the following June 30. Each parcel of real estate, identified by Section, Block, Lot and Identification number, was appraised annually by the City Tax Commission as of January 25 and placed upon a tentative (7) assessment roll, which was open for inspection from February 1 to March 15. During this period an aggrieved owner could seek an administrative review by filing with the Tax Commission a protest and sworn application for the correction of any claimed erroneous valuation, setting forth the grounds and bases thereof and could request an oral hearing thereon. A requisite and essential part of the protest was a state-
[fol. 66] ment by the owner of the amount that was believed to be the full value of the property on January 25. A final determination had to be made by the Tax Commission on or before May 25 and if no such determination had been made by that time, the tentative valuations placed upon the assessmnet roll became final.

The assessment roll was then sent to the Comptroller of the City of New York who, between June 20 and June 25 prepared a proposed budget for the ensuing fiscal year and submitted same, together with the assessment roll and his estimates of revenues to be raised from all sources including real estate taxes, to the City Council. On the basis thereof the Council, by June 25, had to adopt a budget for the ensuing fiscal year and to fix the real estate tax rate for that year, which, when applied to the final valuations on the assessment roll would, together with the other estimated receipts, produce the necessary revenue to meet the operating and budgetory requirements of the City for that year.

Bills for the real estate tax on each parcel—the product of the tax rate thus established and the final valuations on the assessment roll—were then sent to each owner and

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*** In 1945 these subsidiaries were merged into taxpayer. Prior thereto consolidated Federal income tax returns were filed. For convenience, they will be treated as part of taxpayer for the entire period.**

became payable in two instaliments, October 1 and April 1 of the fiscal year. Failure to pay the real estate tax when due created a lien in favor of the City against the property involved.

An aggrieved property owner could obtain a judicial review of the protested assessment only if he had exhausted the administrative procedure above outlined and had properly instituted a court proceeding by October 25 in the year the assessment became final. The petition filed in such proceeding had to allege, among other things, [fol. 67] the basis upon which the relief was sought and the full value as of January 25 that the owner claimed for the property. The value thus claimed or admitted by the owner became the minimum value of the property that could be found by the Court.

Under the law of New York, the only proper and lawful real estate tax on any parcel of real estate, the valuation of which is in litigation, is the product of the established tax rate as above outlined (which once established does not vary for the particular fiscal year) and the value of the property as ultimately determined in the litigation. However, the institution or pendency of such litigation does not postpone the dates (9) upon which the bills for the real estate taxes become due and payable and does not remove or suspend the lien upon the property which arises when the tax bills are not paid when due. Such a tax lien has the force and effect of a judgment lien that could be foreclosed and the property sold.

There is no provision in the law of New York by which the tax lien could be removed or suspended, whether by injunction, bond, or otherwise, except by payment of the billed tax when due. Under the New York law an aggrieved property owner, no matter how valid his grievance, must first pay the real estate tax as billed and then seek rectification of the error by the exclusive statutory remedy as above outlined, or else run the risk of having the tax lien on the property foreclosed and the property sold, in addition to incurring a 7% interest penalty.

The present claim for refund is identical in principle with that part of the claim for refund of 1941 Federal income taxes which dealt with the treatment therein of [fol. 68] the real estate taxes of the City of New York,

and which was rejected by the Commissioner. With respect to that claim, the facts are similar to those involved herein. In 1941, the litigation that was pending between the City of New York and taxpayer (and its subsidiaries) with respect to the valuation of taxpayer's properties for the years 1938, 1939 **, 1939/1940 and 1940/1941 was finally brought to an end. The amounts of (a) the final valuation on the properties (10) in dispute assessed by the City, (b) the valuations admitted by taxpayer in its protests and petitions, (c) the overvaluations claimed by taxpayer in its protests and petitions, (d) the amounts of the contested valuations that were finally upheld in said proceedings, and (e) the amounts by which the contested valuations were reduced by the final determinations therein *** are set forth in Schedule A, annexed hereto.

Taxpayer paid the real estate taxes when due in full based upon the final assessed valuations made by the City, without regard to the protests and then pending litigation with respect thereto and took deductions for same in its Federal income tax returns as set forth in Schedule B, annexed hereto.

The real estate valuations as admitted by taxpayer in the then pending litigation; as contested therein; as upheld and adopted by the Court; and as reduced by the Court, expressed in terms of the real estate tax deductions set forth in Schedule B, are set forth in Schedule C, annexed hereto.

[fol. 69] For purposes of simplification, these various figures, when reduced to a unit of $100, may be expressed as follows:

a) Amount of real estate taxes, assessed, paid and taken as a deduction in the Federal income tax return	$100.
b) Amount of liability therefore admitted	85.
c) Amount of liability therefor denied	15.

** The City changed from a calendar year to a fiscal year on July 1, 1939.

*** Suits between the City and taxpayer's subsidiaries for the years 1938, 1939, 1940 and 1941 were similarly determined and disposed of.

(11)

d) Amount of the disputed liability, found by Court to be valid 10.

e) Amount of the disputed liability, found by the Court to be invalid and refunded to taxpayer in 1941 5.

Upon final audit of taxpayer's return, the Commissioner of Internal Revenue allowed taxpayer, pursuant to I.T. 3491, 1941—2 C.B. 177, as deductions for real estate taxes in each of the years 1938, 1939 and 1940, amounts equivalent to the hypothetical $95, and pursuant to G.C.M. 25298, 1947—2 C.B. 39 and I.T. 3863 issued thereon, 1947—2 C.B. 141, the Commissioner included in taxpayer's 1941 income tax returns the amounts equivalent to the refunds of the hypothetical $5.

Claims for refunds for the years 1938, 1939 and 1941 were duly filed and suits thereon were duly instituted and are still pending in the United States Court of Claims (Nos. 49654, 49655 and 50432), wherein taxpayer claims that only the admitted tax liabilities ($85.) are accruable and deductible for income tax purposes in the years assessed; that the unadmitted and contested tax liabilities [fol. 70] are contingent and not accruable nor deductible until the contest is resolved by final Court determination or otherwise; that it is accruable and deductible only in the year of such determination, and to the extent that it is determined that such liability exists and is valid ($10.); and that the amount refunded as a result of that determination ($5.) does not constitute income in the year of receipt. The claims for refund were rejected on the basis of G.C.M. 25298 and I.T. 3863, supra.

(12)

The position which the Commissioner has taken in these pending suits adheres to said G.C.M. 25298, and I.T. 3863, supra; namely, that the amount of real estate taxes paid in any year is deductible in the year of payment regardless of the fact that liability therefor is denied and contested, and that the amount of the unadmitted and contested liability for the real estate taxes that is refunded

as a result of the termination of the litigation in respect thereto, is includible in gross income in the year of receipt.

The present claim for refund of income taxes for the year 1951, as hereinafter set forth, is based upon the treatment for income tax purposes of the final determination and settlement effected in 1951 of the then pending litigation with respect to the unadmitted and contested real estate taxes for the years 1943 to 1951 inclusive, and is identical in principle with the issues raised and now pending in the United States Court of Claims for the years 1938, 1939 and 1941.

For the fiscal years ending June 30, 1944 to June 30, 1951 inclusive, the City of New York complied with the provisions of law with respect thereto, as hereinabove outlined with respect to valuations for real estate tax [fol. 71] purposes, and made timely, final assessments of valuations of real property in the City of New York, and duly established the tax rates thereon for each of the respective fiscal years. In due course bills were sent to taxpayer based thereon for each of the parcels of real estate in the City of New York owned by taxpayer in said respective years.

(13)

In each of said years taxpayer duly filed protests to some of the valuations set forth on the tentative assessment rolls with respect to certain of its properties, which protests were rejected by the City of New York. Taxpayer then duly paid under protest the full amount of the tax bills issued by the City for the real estate taxes levied upon the properties on their respective due dates. The payments were involuntarily made under compulsion of the law to avoid any tax liens arising upon its properties, and to avoid any penalties, and were made without prejudice to any of its rights, and without admission of liability for, or validity of, the purported assessments upon said properties or taxes levied thereon.

Thereafter, taxpayer duly instituted, in each of the years of assessment and payment of said taxes, timely suits for judicial review of said assessments, setting forth therein, as it did in the protests to said assessments as

originally filed with the Tax Commission, the full value of each parcel that was in dispute.

In 1951, there were pending in the Supreme Court of the State of New York duly instituted suits for the judicial review of the final assessed valuations of some of taxpayer's real estate properties in each of the City fiscal years 1943/1944 to 1950/1951 inclusive. In 1951, [fol. 72] those pending suits were finally resolved and final orders were entered therein determining the proper final valuations of the parcels in dispute for each of the years in suit, which valuations were somewhat lower than that determined by the Tax Commission but somewhat greater than that admitted and claimed (14) by taxpayer. This resulted in a real estate tax liability with respect to each of the parcels of real estate in dispute for each of the years involved in amounts somewhat greater than originally admitted by taxpayer, but somewhat less than the amounts originally asserted by the City and paid by taxpayer. The excess of the real estate taxes thus determined to have been paid in the prior years were refunded to taxpayer in 1951.

Annexed hereto as Schedule D are tabulations showing

(a) Total assessed value on all properties owned by taxpayer,
(b) Final valuations of the properties in dispute, as assessed by the City ($100),
(c) Values admitted by taxpayer ($85),
(d) Overvaluations claimed by taxpayer ($15),
(e) Contested valuations held valid by the Court ($10), and
(f) Contested valuations held invalid and reduced by the Court in the final orders entered in the pending litigation ($5).

(15)

The full amounts of the real estate taxes as billed by the City for the parcels of real estate that were in controversy were paid and deductions for same were taken [fol. 73] by taxpayer in its Federal income tax returns as set forth in Schedule E, annexed hereto.

The real estate valuations of the properties in controversy, as admitted by taxpayer in the then pending litigation; as contested therein by taxpayer; as upheld and finally adopted by the Court; and as reduced and held invalid by the Court, expressed in terms of the real estate taxes taken as income tax deductions in the years 1943 to 1950, inclusive as shown in Schedule E, are as set forth in Schedule F, annexed hereto.

Taxpayer filed a tentative Federal income tax return for the calendar year 1951 on or about March 17, 1952, disclosing an estimated tax liability of $30,987,000.00. On or about June 13, 1952 taxpayer filed its final return for the calendar year 1951, disclosing a tax liability of $30,310,237.76 which was paid in installments as follows:

March 17, 1952	$10,868,000.00
June 13, 1952	10,349,166.43
September 15, 1952	4,546,535.67
December 15, 1952	4,546,535.66
	$30,310,237.76

(16)

Included in said final income tax return for 1951 was a deduction for all kinds of taxes accrued during that year, aggregating $54,914,777.40. Included therein was a net figure of $15,777,378.95 arrived at as follows:

Total Real Estate Taxes Accrued in 1951	$18,374,742.94
Refund of Real Estate Taxes deducted in 1943 to 1950, inclusive, received in 1951	2,597,364.00
Net	$15,777,378.94

[fol. 74] This treatment of the refund of the real estate taxes from the City of New York increased the net income of taxpayer for the year 1941 to the same extent as if said refund had instead been included in taxpayer's gross income for that year; and had the same income tax effect for that year as did the Commissioner's inclusion of the hypothetical $5 in taxpayer's gross income in 1941 supra.

Taxpayer claims that this treatment of the refund of

the real estate taxes in 1951, just as the Commissioner's inclusion of the $5 in taxpayer's gross income for 1941, supra, is erroneous and improper; and, for the same reasons as claimed in the pending suit in the United States Court of Claims, erroneously and improperly increases the taxpayer's net income for the year 1951 by $2,597,364.00. The refund is in effect a return of a deposit for taxes and has no bearing or effect on taxpayer's taxable income for that year.

Taxpayer further claims that the $8,770,438.80 (column (d) of Schedule "F", which is the equivalent of the (17) hypothetical $10 in the illustrative example, supra), which is the portion of the unadmitted and contested real estate taxes that was first determined to be due in 1951 when the pending suits against the City of New York were finally terminated, is a proper deduction in 1951 when taxpayer's liability therefor was first fixed and determined—liability therefor having until then been contingent pending the outcome of said suits. However, no deduction for this amount was taken in the return. This [fol. 75] claim of taxpayer is identical with that made by taxpayer with respect to its claim for refund of its 1941 income taxes, and which was rejected by the Commissioner on the basis of G.C.M. 25298 supra and I.T. 3863, supra, and which is the basis of the suit now pending in the United States Court of Claims.

Taxpayer in this claim for refund relies upon the principles enunciated by the Supreme Court in *Dixie Pine Products Co.* v. *Commissioner,* 320 U. S. 516 (1944) and *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281 (1944) to the same extent as it did in its 1941 claim for refund. The same reasons advanced by taxpayer in the pending Court of Claims case for considering the Commissioner's rejection of its claim for refund for 1941 to have been erroneous and improper, are advanced herein in support of this claim.

By reason of all of the foregoing, taxpayer's net income for the taxable year 1951 has been overstated by $11,367,802.80 and the Commissioner of Internal Revenue has erroneously, improperly and illegally collected from taxpayer as income taxes for the year 1951 the sum of $5,769,159.92.

[fol. 76]

Orig—
2/21/55

REVISED COMPUTATION OF TAX LIABILITY—
YEAR 1951

Net Income—per Return Filed		$62,576,391.06
Less asserted overstatement of Income—Page 12 of Claim		11,367,802.80
		$51,208,588.26
Less: Dividend Credit etc. per Return		2,840,821.60
		48,367,766.66
Effective Rate		50.75%
Revised Tax Liability (Before Statutory Items)		24,546,641.58
Less—Statutory Exemption	5,500.00	
—Tax Free Interest	63.74	5,563.74
(Page 3—Return)		
Revised Tax Liability		24,541,077.84
Paid under Original Return		30,310,237.76
Overpayment of Tax		(5,769,159.92)

[fol. 77]

SCHEDULE "A"

	1938	1939	1939/1940	1940/1941
a) Assessed Value	$410,985,375	$416,635,375	$407,040,350	$402,707,900
b) Admitted Value	294,449,375	304,592,475	301,180,650	283,329,800
c) Claimed Over-valuation	116,536,000	112,042,900	105,859,700	119,378,100
d) Contested Value Upheld	90,841,000	86,247,900	89,269,700	104,723,100
e) Contested Value Reduced By	25,695,000	25,795,000	16,590,000	14,655,000

[fol. 78]

SCHEDULE "B"

Paid and Deducted in

Real Estate Taxes	1938	1939	1940	1941
First half 1938	$ 6,034,455.26			
Second half 1938	6,032,679.75			
First half 1939		$ 6,021,790.73		
First half 1939/1940		6,004,087.07		
Second half 1939/1940			$ 5,973,284.69	
First half 1940/1941			6,022,816.87	
Second half 1940/1941				$ 5,802,254.04
First half 1941/1942				5,677,127.89
Total	$12,067,225.01	$12,025,877.80	$11,996,065.56	$11,479,381.93

[fol. 79]

SCHEDULE "C"

	1938	1939	1940	Total
a) Real Estate tax deduction taken in Fed. I. T. Returns	$12,067,225.01	$12,025,877.80	$11,996,065.56	$36,089,168.37
b) Admitted Liability	8,643,986.47	8,868,859.86	8,649,144.65	26,131,990.98
c) Contested Amount	3,423,238.54	3,187,017.94	3,346,920.91	9,957,177.39
d) Contested Amount Held Valid by Court	2,664,927.54	2,567,757.69	2,878,812.41	8,108,497.64
e) Contested Amount Held Invalid by Court and Refunded in 1941	758,311.00	622,260.25	468,108.50	1,848,679.75

[fol. 80]

SCHEDULE "D"

	Total Assessed Value On All Properties	Total Assessed Value On Disputed Property ($100)	Admitted Value ($85)	Claimed Over-valuation ($15)	Contested Value Upheld ($10)	Final Reduction ($5)
1943/1944	$506,782,775	$ 3,573,900	$ 2,118,400	$ 1,455,500	$ 495,500	$ 960,000
1944/1945	515,453,025	5,631,600	5,139,400	492,200	492,200	—
1945/1946	493,427,850	36,370,900	34,228,800	2,142,100	1,642,100	500,000
1946/1947	472,192,350	63,073,600	52,805,200	10,268,400	5,618,400	4,650,000
1947/1948	497,541,450	410,527,400	313,243,150	97,284,250	63,359,250	33,925,000
1948/1949	508,458,750	422,844,100	314,228,350	108,615,750	82,990,750	25,625,000
1949/1950	525,299,450	436,573,000	330,665,580	105,907,420	90,282,420	15,625,000
1950/1951	549,200,750	413,371,200	312,312,780	101,058,420	90,433,420	10,625,000

[fol. 81]

SCHEDULE "E"

Real Estate Taxes On Parcels in Controversy	Paid and Deducted in 1943	1944	1945	1946
First half 1943/1944	$ 54,492.93			
Second half 1943/1944		$ 54,492.93		
First half 1944/1945		81,939.78		
Second half 1944/1945			$ 81,939.78	
First half 1945/1946			512,726.33	
Second half 1945/1946				$ 512,736.23
First half 1946/1947				899,451.11
Total	$ 54,492.93	$ 136,432.71	$ 594,665.11	$ 1,412,187.34

	Paid and Deducted in 1947	1948	1949	1950
Second half 1946/1947	$ 899,451.11			
First half 1947/1948	6,169,749.48			
Second half 1947/1948		$ 6,169,749.47		
First half 1948/1949		6,301,134.65		
Second half 1948/1949			6,301,134.65	
First half 1949/1950			6,500,666.29	
Second half 1949/1950				$6,500,666.29
First half 1950/1951				6,689,020.53
Total	$7,069,200.59	$12,470,884.12	$12,801,800.94	$13,189,686.82

[fol. 82]

SCHEDULE "F"

Year	Real Estate Tax Deduction in Returns ($100)	Admitted Liability ($85)	Contested Amount ($15)	Contested Amount Held Valid ($10)	Contested Amount Held Invalid—Refunded in 1951 ($5)
1943	$ 54,492.93	$ 32,341.20	$ 22,151.73	$ 7,559.73	$ 14,592.00
1944	136,432.71	107,119.48	29,313.23	14,721.23	14,592.00
1945	594,665.11	557,306.61	37,359.50	30,309.50	7,050.00
1946	1,412,187.34	1,235,864.22	176,323.12	103,128.12	73,195.00
1947	7,069,200.59	5,460,301.99	1,608,898.60	1,032,637.35	576,261.25
1948	12,470,884.12	9,388,320.43	3,082,563.69	2,190,366.19	892,197.50
1949	12,801,800.94	9,603,882.42	3,197,918.52	2,583,076.02	614,842.50
1950	13,189,686.82	9,976,412.41	3,213,274.41	2,808,640.66	404,633.75
Totals	$47,729,350.56	$36,361,548.76	$11,367,802.80	$8,770,438.80	$2,597,364.00

[fol. 83] EXHIBIT B

Duplicate

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

☒ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY OR EXCESSIVELY COLLECTED.

Name of taxpayer or purchaser of stamps CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Business address 4 IRVING PLACE NEW YORK 3 NEW YORK

1. District in which return (if any) was filed Lower Manhattan—New York

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1951, to Dec. 31, 1951

3. Character of assessment or tax Corporation Income Tax

4. Amount of assessment, $30,310,237.76; dates of payment, Mar. 17; June 13; Sept. 15; Dec. 15, 1952

6. Amount to be refunded $30,310,237.76

[fol. 84] The claimant believes that this claim should be allowed for the following reasons:

For basis of Claim, see Schedule A annexed hereto and made a part hereof.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

C. E. EBLE
VICE PRESIDENT

Dated March 15, 1955

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

SCHEDULE A TO EXHIBIT "B"

1. The taxpayer, on or about March 17, 1952, filed a tentative return for the calendar year 1951, which reflected an estimated tax liability for the year 1951 in the amount of $30,987,000. An extension of time was obtained until June 15, 1952, within which the completed return should be filed. On June 13, 1952, the completed tax return for the year 1951 was filed. This completed return reflected a tax liability in the amount of $30,310,237.76. [fol. 85] Payments were made on the basis of the completed return as follows:

March 17, 1952	$10,868,000.00
June 13, 1952	10,349,166.43
September 15, 1952	4,546,535.67
December 15, 1952	4,546,535.66

2. Under Section 6511—of the Internal Revenue Code of 1954 refunds of overpayments may not be made unless a Claim for Refund is filed by the taxpayer within three years from the time the return was filed, or two years from the time the tax was paid. Accordingly, a Claim for Refund is hereby made within the statutory period for the taxable year 1951.

3. The completed return of the taxpayer for the taxable year 1951 has been audited by the Internal Revenue Service, but the Revenue Agent's Report of his adjustments to taxable income, has not been received to date. However, on March 14, 1955, at the request of the Revenue Agent; Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment (Form 870) covering additional tax for the year 1951 in the amount of $191,657.88, was executed and filed with the Internal Revenue Service. Also at the request of the Revenue Agent, a consent fixing Period of Limitation upon Assessment of Income and Profits Tax (Form 872) until June 30, 1956, will be executed and filed by the taxpayer for the year 1951 with the Internal Revenue Service within the next few days.

[fol. 86] 4. Under date of February 10, 1955, a Claim for Refund was filed by the taxpayer with the Internal Revenue Service, for the refund of income taxes for the year 1951, in the amount of $5,769,159.92 or for any such greater amount as is legally refundable. The basis of this claim was the erroneous inclusion as taxable income the refund received in respect of disputed real estate taxes for the year 1943 through 1950, settled in 1951. The purposes of filing this claim were to associate this refund received in 1951 with a similar type of refund received in 1941 forming the basis of suit now pending in the United States Court of Claims, No. 50432, and to institute immediate suit before that court for the 1951 settlement, thereby formally bringing before the Attorney General of the United States for consideration the single issue of disputed real estate taxes of the taxpayer for the period—year 1938 through 1950.

The present Claim for Refund is supplementary to the Claim for Refund under date of February 10, 1955, referred to above, and by this reference incorporates in this Claim for Refund all the statements made in the February 10, 1955 Claim that the taxable net income of the taxpayer for the year 1951 was overstated by the erroneous inclusion as income the refund received in 1951 in respect of disputed real estate taxes for the year 1943 through 1950, settled in 1951.

5. In the completed tax return of the taxpayer for the year 1952, filed June 15, 1953, there was claimed under Deductions—Item 25—Depreciation, the amount of $36,400,000.00. This amount among other things included an [fol. 87] item of Special Obsolescence, amount $1,005,771.40 covering the retirement in place of four motor driven reciprocating gas compressors, motors and related equipment at the Hunts Point Gas Manufacturing Plant. (28)

These facilities were physically disconnected and made inoperative in June 1951. Up to that time, this equipment had been used in blowing water gas in the 24" high pressure mains serving certain portions of Bronx and Westchester Counties. With the introduction, however, of natural gas into these areas, occasioning the conversion of the carburetted water gas sets at the Pelham Gas Manufacturing Plant to the manufacture of oil gas of approximately 1,000 BTU per cubic foot, the use of the compressors in question for blowing purposes were no longer needed.

While the four compressors etc. were disconnected in June 1951, their retirement was not authorized by the Board of Trustees until July 1952. The delay of approximately a year in authorizing their abandonment was due to the consideration of their possible re-use elsewhere on the system. Management had not completed its system study of natural gas distribution until July 1952 or thereabouts, at which time it became known these facilities would not be needed in the ultimate gas program of the taxpayer. The calculation to determine the deduction for special obsolescence was made, therefore, in the light of the above circumstances. The deduction in the amount of $1,005,771.40 was considered therefore as reasonably applicable to the year 1952.

[fol. 88] Should it be asserted in final review of the audit of the completed return of the taxpayer for the year 1951, or in the field audit of the completed return for the year 1952 yet to be made, that the deduction for special obsolescence in respect of these facilities should relate to the year 1951 in whole or in part, to the extent that the amount of income tax for the year 1951 as finally

determined by the Internal Revenue Service includes an allowance for this transaction in its computation of tax liability, the income tax for the year 1951 was consequently overpaid, and Claim for Refund is hereby made.

6. The taxpayer will assemble and furnish any further information and data, in respect of the several transactions supporting this Claim for Refund, that may be required for the proper determination of this Claim. The taxpayer requests an opportunity to discuss this Claim for Refund when it is reached for consideration.

[fol. 89] IN UNITED STATES DISTRICT COURT

ANSWER

(35)

Defendant, by its attorney, Paul W. Williams, United States Attorney for the Southern District of New York, alleges as follows for its answer to plaintiff's complaint:

1. Admits the allegations in paragraph 1.
2. Admits the allegations in paragraph 2.
3. Admits the allegations in paragraph 3.
4. Admits the allegations in paragraph 4.
5. Admits the allegations in paragraph 5.
6. Admits the allegations in paragraph 6,

except specifically to deny all statements of fact in Exhibit A not otherwise specifically admitted in this answer, and to deny that there was in fact an overpayment.

7. Admits the allegations in paragraph 7, except specifically to deny all statements of fact in Exhibit B not otherwise admitted in this answer, and to deny that there was in fact an overpayment.

8. Denies the allegations in paragraph 8, except to admit that the alleged grounds for recovery in this suit are the same grounds set forth in the refund claims filed on February 10 and on March 15, 1955.

(36)

9. Admits the allegations in paragraph 9.
10. Denies the allegations in paragraph 10.

[fol. 90] AFFIRMATIVE DEFENSE

11. This action is barred by virtue of the fact that the same causes of action, issues, and facts that are asserted by the complaint were or could have been raised in previous actions between this plaintiff and this defendant, which previous actions resulted in a judgment adverse to the plaintiff. The prior actions are reported as Court of Claims Nos. 49654, 49655 and 50432, *Consolidated Edison Co. of New York* v. *United States;* the opinion of the Court is reported at 135 F. Supp. 881 (Ct. Cl. 1955) *cert. denied* 351 U. S. 909; it is now final.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

By: FOSTER BAM,
Foster Bam,
Assistant United States Attorney,
Office & Post Office Address:
United States Court House,
Foley Square,
New York 7, New York.

[fol. 91] (BY NOTICE OF AMENDED PLEADING FILED DECEMBER 11, 1956 THE ANSWER WAS AMENDED TO INCLUDE THE FOLLOWING AS PARAGRAPH 12.)

12. Defendant alleges that if plaintiff's contentions are sustained, either in whole or in part, under any of the alternative theories advanced in its complaint and claims for refund, that the allowance of said contention or contentions would make it necessary in the interest of consistency that a reaudit and redetermination be made of plaintiff's income and excess profits tax liabilities for all the years involved. Under the circumstances just described, adjustments of all items—including income and deductions—for all said years should be made, consistent with the final decision reached herein.

[fols. 92-94] * * *

[fol. 95] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 298—October Term, 1959

(Argued April 13, 1960)
Docket No. 26041

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before LUMBARD, *Chief Judge*, and SWAN and CLARK, *Circuit Judges*.

OPINION—May 25, 1960

Appeal from the United States District Court for the Southern District of New York.

Plaintiff appeals from the order and judgment of Judge Sugarman denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment, and dismissing the complaint in an action to recover an alleged overpayment of income taxes for the year 1951. Judgment reversed.

[fol. 96] WHITMAN, RANSOM & COULSON, *Attorneys for Plaintiff-Appellant*. James K. Polk, Harold F. Noneman, and Julius M. Jacobs of Counsel.

S. HAZARD GILLESPIE, JR., United States Attorney, *for Defendant-Appellee*. Arthur V. Savage, Assistant United States Attorney of Counsel.

SWAN, *Circuit Judge*:

Plaintiff-Appellant is a well-known public utility corporation which keeps its books and files its tax returns on an accrual and calendar year basis. It brought the present suit under 28 U. S. C. A. §1346(a) to recover an alleged large overpayment of federal income taxes for the year 1951. Defendant's answer to the complaint interposed a general denial and an affirmative defense of collateral estoppel. A motion for summary judgment based on the affirmative defense was denied by Judge Palmieri in 1958 in an opinion reported at 162 F. Supp. 854. Thereafter, upon amended pleadings and a stipulation which eliminated all factual issues, each party moved for summary judgment. The district judge, Judge Sugarman, before whom these motions were argued, denied plaintiff's motion, granted defendant's, and dismissed the complaint. This is the order appealed from.

The ultimate questions to be decided are two, namely, (1) whether, under §23(c) of the Internal Revenue Code of 1939, a contested real estate tax liability accrued in the year the litigation was settled, or in a prior year when the contested tax was involuntarily paid under protest; and (2) whether the receipt of a partial refund of the contested and involuntarily paid tax, constituted income to the taxpayer in the year of settlement.

[fol. 97] Before reaching the merits of these issues, it is desirable to consider defendant's contention of collateral estoppel based upon a decision of the Court of Claims which adjudicated the identical issues with respect to contested real estate taxes of earlier years. *Consolidated Edison Co. of N. Y.* v. *United States*, 133 Ct. Cl. 376, 135 F. Supp. 881, cert. den. 351 U. S. 909. The Court of Claims held that the contested taxes were deductible as a liability in the year they were paid to the City of New York, and that the amount refunded was income to the taxpayer in the year it was received from the City.[1]

---

[1] The stipulation mentioned above preserved the Government's right to raise the question of *res judicata* or collateral estoppel on any appeal taken herein.

On the issue of collateral estoppel both parties rely on *Commissioner* v. *Sunnen*, 333 U.S. 591, as they also did when that issue was before Judge Palmieri in 1958. He decided the issue adversely to defendant. We agree with his conclusion and are entirely satisfied with the reasoning of his opinion reported in 162 F. Supp. 854. As the *Sunnen* opinion states at page 601:

> "* * * And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach [fol. 98] a different result or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of *stare decisis*."

Under the New York law as to real estate taxes, the assessed valuation and the tax imposed on a given parcel of land for a given year is separate from, independent of, and unconnected with the assessed valuation and tax imposed on that parcel for any other year; and the same is true with respect to the administrative and judicial proceedings by which an aggrieved owner seeks review of the contested assessed valuation and the tax on that parcel for the given year. Hence we think it obvious that "the relevant facts" in the Court of Claims case and in the case at bar "are separable, even though they may be similar or identical," and that collateral estoppel does not control the legal issues "which recur in the second case."

To facilitate the presentation and consideration of the facts and legal issues involved, the stipulation above men-

tioned set forth an illustrative example which is applicable to all the years herein involved and reads as follows:

"(a) for the year 1949 plaintiff was notified, on January 25, 1949, of a tentative assessment in the amount of ..... $100.

(b) plaintiff duly filed by March 15, 1949, a bona fide protest, admitting liability of ..... 85.

(c) after hearing duly held and on or about May 25, 1949, final assessment was made in the amount of ..... 100.

(d) thereafter on or about October 1, 1949, under protest and for the stated purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all rights, payment was made of ..... 100.

[fol. 99] (e) on October 25, 1949, certiorari proceedings were duly instituted in the New York Supreme Court admitting liability of, and denying liability in excess of ..... 85.

(f) in December, 1951, the certiorari proceedings were settled, fixing the tax liability at ..... 95.
and establishing an overpayment which was duly refunded, in the amount of ..... $ 5."

The government claims, in terms of the example, that the taxpayer was required to deduct the entire $100 from its gross income in 1949, the year in which the money was paid, and to include in its gross income for 1951 the $5 refunded to it by the City in that year. The taxpayer's position is that it was required to deduct in 1949 only $85, the amount of real estate tax paid and uncontested and that it should be permitted to deduct in 1951 an additional $10, the portion of the disputed $15 ultimately determined to have been properly assessed. The overall effect of the taxpayer's position would be to require the payment of a greater tax than the government claims is due in the year 1949, because of the smaller deduction, and a lesser tax in the year 1951, because of the additional $10 deduction accrued then and the absence of the

inclusion of the $5 refund in gross income. Having paid its 1951 taxes under the government's theory, the taxpayer claims that it is now entitled to a refund.

The stipulation states the legal issues raised herein, in terms of the illustrative example, as follows:

> "(a) whether plaintiff is entitled to a deduction in 1951 of $10, which represents that portion of the disputed $15 which was determined in 1951 to have been properly assessed, and
>
> [fol. 100] (b) whether there was erroneously included in plaintiff's 1951 taxable income $5, which represents that portion of the disputed $15 which was determined in 1951 to have been improperly assessed and which was refunded to plaintiff."

This illustrative example has greatly simplified the facts necessary to be stated on this appeal. It will suffice to say that appellant owns many parcels of real estate in New York City with respect to which corporate real estate taxes for each year were assessed by applying tax rates established by the City Council to final assessed valuations fixed by one City Tax Commission. In each of the years 1938 to 1950, with the exception of 1942 and 1943, the appellant contested in the manner prescribed by local law part of the taxes so imposed. The contest proceedings in respect to the years 1938-1940 were concluded in 1941 by a settlement which fixed the taxes at a somewhat lower figure than the taxes assessed, and the difference was refunded, although this was less than appellant had sought to recover.[2] A similar settlement was concluded in December 1951 of the contest proceedings instituted in respect to the years 1946-1950.

We turn now to the merits of the issues presented by the illustrative example. The sections of the 1939 Code which are involved are §§23(c), 41, 42, 43 and 48.[3] Sec-

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[2] An illustrative example identical with the one set forth above, except for difference in dates, was stipulated by the parties and adopted by the Court of Claims in the prior suit involving the years 1938-1940.

[3] These are the same as their counterparts in the 1954 Code and in the prior Revenue Acts. Reference will be made in terms of the 1939 Code.

tion 23 allows a deduction from gross income to be taken for "taxes paid or accrued within the taxable year"—with exceptions not here material. Section 41 prescribes that net income shall be computed "in accordance with the [fol. 101] method of accounting regularly employed in keeping the books of such taxpayer," unless the method employed does not clearly reflect the income. Section 42 recognizes that items of income, though normally to be included in gross income in the taxable year of receipt, may "under methods of accounting permitted under section 41" be properly accounted for as of a different period. Section 43 says that deductions and credits "shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' upon the basis of which the net income is computed, * * *" Section 48 directs that "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed.

In a number of cases involving the counterparts of these sections, the Supreme Court has explained that a tax liability becomes deductible under §23(c), to a taxpayer keeping its books on the accrual basis, only when all events have occurred which determine the fact and amount of the tax liability. This "all-events rule," announced in *United States* v. *Anderson*, 269 U. S. 422, was very clearly restated in *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516, 519;

> "It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year. It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer. Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could

[fol. 102] not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated."

This was reaffirmed in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281, at 284. And *Lewyt Corp.* v. *Commissioner,* 349 U. S. 237, 242-243 states that "the concept 'accrued' embodies the annual accounting principle," and the amount of the tax accrued within the taxable year "is to be determined in accord with the normal accounting concepts relevant to the accrual basis."

Applying these cases to the issues presented by the illustrative example it is clear that the uncontested $85 of the $100 tax accrued and was deductible in 1949. Indeed, this is admitted by both parties. We think it equally clear that the contested $15 tax liability was, for income tax purposes, a contingent liability which might or might not become a fixed liability depending upon the outcome of the State litigation. In cases of a contested item of liability, accountants usually indicate the existence of contest by showing the item as contingent, or by a footnote. Ten dollars of the contested $15 became a fixed liability when the litigation terminated in 1951, and became deductible in that year. The remaining $5 never became a liability of the taxpayer. Nor was the receipt of that sum from the City in 1951 income of the taxpayer; it was the realization of an asset of contingent value purchased by the taxpayer when it paid the City the $15 it was contesting. A payment may constitute a capital expenditure, an exchange of assets, a prepaid expense, a deposit, or a current expense. When the exact nature of the payment is not immediately ascertainable because it depends on some future event, such as the outcome of litigation, its treatment for income tax purposes must await that event. Thus in *Doyle* v. *Com-*
[fol. 103] *missioner,* 2 Cir. 110 F. 2d 157, this court held that the income tax treatment of forfeited payments received under a contract to sell real estate was to be determined by, and was to be reflected in the year of the subsequent events, rather than the year in which the

payments were received; see also *Bressner Radio, Inc.* v. *Commissioner*, 2 Cir. 267 F. 2d 529.

It is true that the Supreme Court cases above cited did not involve a taxpayer who paid a contested tax during the pendency of the contest. That question was presented in the *Consolidated Edison* case in the Court of Claims, *supra*, and that Court followed its earlier decision in *Chestnut Securities Co.* v. *United States*, 104 Ct. Cl. 489, 62 F. Supp. 574 which held that "Accrual, from the debtor's standpoint, precedes payment and does not survive it." With due respect we disagree with this view. Indeed, the findings of fact with respect to applicable accounting principles which the Court of Claims made in the *Consolidated Edison* case are inconsistent with such decision.[4] The principles of accrual accounting set forth in those findings are correct. A decision supporting them will prevent a taxpayer from taking the inconsistent positions of contesting a liability and at the same time claiming a deduction for it. The position which the government urges seems to us inconsistent with the general [Vol. 104] policy of obtaining the largest amount of tax revenue at the earliest possible date. In the usual run of cases, the government's insistence that the taxpayer take his deduction in the year of paying under protest a contested liability will result in the receipt of less tax revenue in that year. For this reason (among others) in the *Chestnut Securities* case, the government took a position opposite to that here urged. The government lost that case. In following the Court of Claims without discussing the principles involved, we think Judge Sugar-

[4] See Findings Nos. 35 to 38 inclusive, particularly 38 which reads as follows: "Under accrual accounting, when payment is made with respect to a liability which is denied in whole or in part, the accounting principle as to charges against income would be the same as if payment had not been made; such payment would not affect the treatment of any accruals. This principle applies equally to the payment of taxes. The payment of admitted or estimated ultimate liability constitutes the payment of a current charge or expense of operations and the balance of that payment represents an amount estimated to be ultimately recovered and is chargeable to a suspense, deferred debit, or other receivable account. The latter item represents an asset—a deposit which is expected to be recovered."

man fell into error. In conformity with those principles summary judgment should have been entered for the plaintiff-appellant.

It is suggested in criticism of our decision that it leaves open to a taxpayer opportunities for manipulation through self-serving appraisals. Such opportunities are no greater when payment has been made under protest to prevent the attachment of liens or seizure, than when payment has not been made, as in the *Dixie Pine* case. The problem of determining whether the contest is a bona fide one is present in either situation. The criticism, we think, is really directed against the *Dixie Pine* line of decisions.

Accordingly the judgment is reversed and the cause remanded with directions to enter summary judgment for plaintiff-appellant pursuant to paragraph 12 and 13 of the stipulation of the parties.

CLARK, *Circuit Judge* (dissenting):

Apparently accountants and at least some tax lawyers agree that the Commissioner has not been appropriately hospitable to the precepts of accrual accounting and applaud tentative judicial steps toward accepting such precepts. See, e.g., Behren, *Prepaid Income—Accounting Concepts and the Tax Law*, 15 Tax L. Rev. 343 (1960), discussing *Bressner Radio, Inc.* v. *C.I.R.*, 2 Cir., 267 F. 2d 520. For my part I would not disagree and think [fol. 105] that within limits the trend to follow accounting ideas is desirable as bringing tax and business practices mutually into line. But I do feel it must stop short of delivering control of the revenue to the accountants. For accounting is not an exact science; and corporate balance sheets must deal with many fluid items, representing of course much factual information, but also a certain amount of prophecy, of hope, and of sheer argumentation. Because of this, because also the accountant does owe the duty of loyalty to his client, the result will naturally reflect the needs and desires of the client more than the appropriate demands of the tax collector, who not only must collect all the revenue due, but must hold the bal-

ance fairly and without discrimination among taxpayers. And the present holding, which goes beyond anything yet in the books, seems to me to exceed proper bounds in committing final adjudication as to the revenue to corporate accountants.

Consider the actual decision herein. It is that deductions for local tax liability are to be made, not when the liability is due *and* paid, but when some years later and after dispute the parties (not including the representative of the federal revenue) get together and adjust their difference. The opinion suggests no limitation of time or otherwise on the operation of the principle thus broadly announced; and upon reflection I can see none of any actual operative effect. It would seem that a taxpayer, by asserting a dispute as to a liability for taxes paid, may postpone the use of such payment as an income tax deduction practically indefinitely until it finds it expedient to settle the dispute with or without receipt of a refund. I presume the dispute must be honestly asserted with perhaps some indicated possibility of success. But these are such minimal requirements as to the large tax liabilities of great corporations as to be meaningless in practice. Obviously a local tax dispute can be prolonged [fol. 106] for years; and extrinsic factors such as a corporate reorganization might prolong it yet further. Moreover, I do not see how the principle can be limited only to tax payments; it would seem applicable to other disputed payments generally. Thus ascertainment of the corporate income is substantially taken out of the hands of the revenue authorities; discrimination between taxpayers is accomplished on the basis of the astuteness of the accountants employed; and the sound rule of *annual* federal tax accounting—perhaps the cornerstone of federal revenue collecting—is repudiated in a vitally important detail.

Moreover, an examination of the history of plaintiff's real estate tax controversies with the City of New York for the fiscal years here involved indicates that the result reached by the majority does not even accord with generally accepted accounting principles. This is shown clearly by the following table:

City Fiscal Year	Amount of Tax Payment Contested	Amount Refunded	% of Claim
1946-47	$ 292,250.27	$ 132,290.00	45.3
1947-48	2,925,546.94	1,020,232.50	34.9
1948-49	3,239,580.43	764,162.50	23.6
1949-50	3,156,256.61	465,522.50	14.7
1950-51	3,270,292.22	343,745.00	10.5

My brothers are accepting the view that an accountant, viewing the tax payment for the 1950-51 fiscal year, for example, would exclude $3,270,292.22, the amount of the claim, from the tax expense accounts of that period, notwithstanding that prior experience indicates that the corporation was not likely to recover more than about 20 per cent of its claim. The accountant would also be overlooking the fact that in presenting claims based upon disputed property assessments a taxpayer will generally inflate his claim in order to secure a more strategic [fol. 107] bargaining position. I see little correspondence between such result and the fundamental aim of accrual accounting which is to match revenues with the expenses incurred in producing such revenues.

When the amount of claimed refund is thus made determinative for federal corporate tax purposes, an open invitation is extended to manipulation through self-serving appraisals. The date and amount of payment, however, appear to me to represent a fixed and definite standard, which should be here adopted in preference to the amount which the corporation unilaterally determines to contest, or to an uncertain estimate or educated guess as to the amount of refund which may be secured at some unknown future date. See *Automobile Club of Michigan v. C. I. R.*, 353 U. S. 180. Moreover, there is little reason why a taxpayer who has suffered an out-of-pocket expenditure in satisfaction of a tax assessment should be penalized by the denial of a deduction merely because he embarks upon the uncertain and often unrewarding course of contesting the amount of the assessment.

Certain Supreme Court decisions are relied on as forcing the result here reached; but at most they subscribe only to the trend as I have done above, and do not try to establish what the limits, so obviously necessary and in-

evitable, will be. Justice Roberts in *Security Flour Mills Co.* v. *C. I. R.*, 321 U. S. 281, 286, indeed goes so far as to speak disparagingly of taking cash payments, *inter alia*, "out of the annual accounting system and, for the benefit of the Government or the taxpayer, treat[ing them] on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or the taxpayer." Neither in that case nor in *Dixie Pine Products Co.* v. *C. I. R.*, 320 U. S. 516, also principally relied on, is there any holding that tax liabilities already paid [fol. 108] should not be accounted for taxwise until all disputes have somehow been put at rest.[1] On the other hand, in the only actual cases presenting the precise issue, the Court of Claims in reasoned opinions, noting and considering the obstacles I have discussed above, has reached the opposite result, which Judge Sugarman below quite properly followed. See the persuasive opinion of our oft-times colleague Judge Madden in *Chestnut Securities Co.* v. *United States*, 104 Ct. Cl. 489, 62 F. Supp. 574, and of Judge Littleton in this very case in earlier years. *Consolidated Edison Co. of N. Y.* v. *United States*, 133 Ct. Cl. 376, 135 F. Supp. 881, certiorari denied 351 U. S. 909. See also 2 Mertens, Law of Federal Income Taxation §12.67, p. 106, n. 94 (1959 Cum. Supp.). Even though it has been summarily rejected by my brothers, I think Judge Madden in the *Chestnut Securities Co.* case, *supra*, 104 Ct. Cl. 489, 62 F. Supp. 574, 576, has stated the correct principle for decision here that "Accrual, from the debtor's standpoint [and the government's as well], precedes payment, and does not survive it."

I would affirm.

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[1] In *Dixie Pine Products Co.* v. *C. I. R.*, 320 U. S. 516, a taxpayer on the accrual basis was not allowed to deduct state taxes which he was contesting and *had not paid*. No question was raised as to taxes of a previous year which had been paid. In *Security Flour Mills Co.* v. *C. I. R.*, 321 U. S. 281, a taxpayer who was making late reimbursement of a federal processing tax which had been declared invalid was not allowed to deduct these repayments as of the date of the original tax. *Lewyt Corp.* v. *C. I. R.*, 349 U. S. 237, also cited, concerns only the accruing of a federal excess profits tax in a year *earlier* than that of payment. None of these cases suggests the possibility that accrual may occur long after payment.

[fol. 109] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(File Endorsement Omitted)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

JUDGMENT—May 25, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded with directions to enter summary judgment for appellant in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

[fol. 110] • • •

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 112] SUPREME COURT OF THE UNITED STATES

No. 357, October Term, 1960

UNITED STATES, PETITIONER

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

ORDER ALLOWING CERTIORARI—Filed November 14, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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